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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

CONCERNED BLACK EDUCATORS OF BOSTON,
INTERVENOR, RESPONDENT.

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Is a judicial order in a school desegregation case equitable and constitutional where that order simply implements remedial orders which had been previously entered into by the District Court, and where that order, as well as the earlier remedial orders, were solely designed to rectify unconstitutional conditions which the District Court found to have existed in the school system?

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Concerned Black Educators of Boston (CBEB), an organization of black teachers permitted to intervene as plaintiffs-intervenors in the above-entitled case, oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit brought by the Boston Association of School Administrators and Supervisors, AFL-CIO, requesting this Court to review the First Circuit's judgment in *Morgan et al*

v. *O'Bryant, et al.*, (C.A. 1, Nos. 81-1561, 81-1617, 81-1619, and 81-1646; February 17, 1982).

Summary of the Argument.

The Petition for a Writ of Certiorari of the Boston Association of School Administrators and Supervisors, AFL-CIO [BASAS] seeks to reverse the decision of the District Court for the District of Massachusetts entered July 19, 1981, ordering that the current percentage of Black administrators be maintained even in the face of layoffs of administrators.

BASAS argues that the court should have sustained the motion of the School Committee to permit the reassignment and reduction of headmasters and principals for the 1981-82 school year by means of seniority alone. Approval of such a motion would have reduced the ratio of Black category I administrators from 20.53% to 13.8% (Appendix [A] 4).

However, rather than allowing the progress made during this 7-year old desegregation case to be nullified in a single year, the Court ordered that existing percentages of the Black administrators be maintained. In so doing, the court did nothing more than to preserve the integrity of its earlier orders with respect to administrative desegregation, an order from which BASAS did not appeal. The court's initial orders were designed to remedy specific constitutional violations found by the District Court and affirmed by the First Circuit Court of Appeals, violations which included intentional segregation in the hiring, promotion and assignment of Black administrative personnel. The order entered into by the District Court in 1981 was simply designed to implement those remedial orders and to insure that the progress already made towards a desegregated school system would not be dismantled. Each of the

orders was carefully constructed so as to restore the victims of discrimination — the school children of Boston — to the positions they would have occupied in the absence of discriminatory conduct. Until Black students are able to enjoy the status that they would have enjoyed had there not been this sorry history of discrimination, the District Court's authority to continue to fashion remedies consistent with its finding of liability remains.

Much of the argument contained in CBEB's Opposition to the Petition for a Writ of Certiorari filed by the Boston Teacher's Union is applicable to the present opposition and should be incorporated where appropriate. Just as the Court has equity powers to preserve the integrity of its prior orders with respect to faculty, so does the court have equity power to preserve integrity of prior orders regarding administrators. Just as the Court has the authority to make race-conscious decisions regarding faculty, so does the court have remedial authority to make race-conscious decisions regarding administrators.

The District Court has done nothing which is inconsistent with applicable decisions of this Court and of the lower federal courts. In short, none of the criteria for certiorari has been met.

Reasons for Opposing the Writ.

I. The Decision Below is Consistent with General Principles of Constitutional Law Articulated by this Court and by the Lower Federal Courts.

BASAS, in its Petition for a Writ of Certiorari, mischaracterizes the Court's 1981 order and the applicable case law. The 1981 order is not enforcing a particular racial balance as a matter of substantive constitutional right, any more than the

orders of the District Court did in 1975 and 1976. The Court made a finding that the constitution had been violated because a dual school system existed. As part of that finding, the Court found that the defendants intentionally segregated Black staff, and intentionally discriminated against Blacks in the hiring and promotion of Black administrators. The Court's initial orders in the case, requiring 20% administrative staff and affirmative recruitment until the ultimate goal of 25% Black administrators was reached, was a temperate response to that constitutional violation. Of significance is the fact BASAS never appealed the 1976 order. In 1981, when conditions threatened that remedy, new orders were entered by the Court designed to preserve the gains already made. The underlying findings of the District Court are unassailed and unassailable; the remedial orders in 1976 and now in 1981 flow naturally from those findings. All that the court has done is to preserve the integrity of its prior orders regarding principals and head masters. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Oliver* v. *Kalamazoo Board of Education*, 498 F.Supp. 732 (W.D. Mich. 1980) (appeal pending).

The cases cited by BASAS are inapplicable. *Steel Workers* v. *Weeber*, 443 U.S. 193 (1979) and *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) do not involve carefully drafted remedial orders entered by a court after specific findings of constitutional violations. Rather, they involve private affirmative action arrangements, not subject to prior court scrutiny and attention. The Court has been quite clear that once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of discrimination. *Regents of the University of California* v. *Bakke*, 438 at 305 (Powell, J.); *Id.* at 362-379 (Brennan, White, Marshall and Blackman, JJ., concurring in the judgment in part and disent-

ing in part); *Fullilove* v. *Koutznick*, 448 U.S. 448, 477-78 (1980).

Franks v. *Bowman Transportation Company*, 424 U.S. 747 (1976) is also mis-cited. BASAS argues that the District Court's order discriminates in employment and lacks the proper factual findings because no minority individuals have been identified as the victims of any discrimination. But as the District Court has said numerous times, and as the Court of Appeals has reaffirmed, victims in the instant case are the Black school children, not the possible hiring discriminatees. *Morgan* v. *Kerrigan*, 530 F.2d 431, 432; *Morgan* v. *Hennigan*, 379 F.Supp. 410, 456 (D. Mass. 1974); *Morgan* v. *Kerrigan*, 509 F.2d 580, 600 n.3 (1st Cir. 1974).

Next, BASAS suggests that even Black school children are not benefitted by this order because there were "no findings" made by the court that the plaintiffs' required role models in order to be made whole. Indeed, taking a single quote from the District Court's 1974 opinion out of context, they imply that the District Court found that the role model thesis was invalid. (BASAS Petition, p. 9).

It was the defendants in the instant case who initially proposed the role model theory in order to justify predominantly black faculty and staff in black neighborhoods. The court patently rejected such a justification; to hold otherwise would have been to affirm a dual school system. 379 F.Supp. 410, 460 (D. Mass. 1974).

But the District Court hardly rejected the thesis where it applied to having an appropriate black presence on the faculty and staff throughout the Boston Public School System. That was plainly the basis for the 20% figure. 379 F.Supp. at 466.

II. The Decision Below is Consistent with Settled Principles of Remedy in Desegregation Cases.

The District Court's decision was completely consistent with the standards for equitable remedies in school desegregation cases set forth by this Court in *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977). (See opposition to Petition for Writ of Certiorari filed by Local 66, Boston Teachers Union, AFT, AFL-CIO, pp. 6-12.)

As has been argued in CBEB's Opposition to the Petition for Certiorari filed by the Boston Teachers Union, the Court's decision with respect to administrators plainly met both the first and second *Milliken* requirements. With respect to the third criterion, the importance of taking into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution, *Milliken* v. *Bradley*, 433 U.S. at 280-281, judicial deference is not without limits. As the Court noted in *Milliken*, if, however, "school authorities fail in their affirmative obligations . . . judicial authority may be invoked." 433 U.S. at 280-281. Plainly, in the instant case, the Boston School Committee failed to carry out their affirmative obligation to remedy the constitutional violation found by the Court. Moreover, as the Court of Appeals found, the order is not particularly intrusive into local affairs. It simply requires compliance with earlier orders, without becoming involved in local matters such as control of the budget, etc. Moreover, the Court pointed to the fact that the School Committee itself took no position in the appeal of its order, noting that, under the circumstances, "it is difficult to accept an argument premised on that body's interest in maintaining its own affairs." (A. 13.) Indeed, for the Court of Appeals, the other local authority involved, the State Board of Education, filed a brief in support of the District Court's order.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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